U.S.
APR 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1539

METRO TRUCK BODY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CASTELLANOS & O'NEILL
FRANCIS J. O'NEILL, Esq.

1346 Wilshire Boulevard
Los Angeles, California 90017
Telephone: 213/484-1772

Attorneys for Petitioner

METRO TRUCK BODY, INC.

PANDICK PRESS, WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THIS WRIT	10
I. First Question Presented	10
II. Second Question Presented	11
CONCLUSION	14

INDEX

AUTHORITIES CITED

CASES	PAGE
United States Supreme Court:	
N.L.R.B. v. Tower Co., 329 U.S. 324, 333, (1946)	11
United States Court of Appeals:	
N.L.R.B. v. Air Control Prods. of St. Petersburg, Inc., 335 F.2d 245, 249 (C.A.5)	12, 13
N.L.R.B. v. Bata Shoe Co., 377 F.2d 821 (C.A. 4)	12, 13
N.L.R.B. v. IDEAL LAUNDRY AND DRY CLEANING CO., 330 F.2d 712	12
N.L.R.B. v. JOCLIN MFG. CO., 134 F.2d 627	12
N.L.R.B. v. ORTRONIX, INC., 380 F.2d 737 (C.A. 5)	12
N.L.R.B. v. POINSETT LUMBER MFG., 221 F.2d 121	12
N.L.R.B. v. SUN DRUG CO., 359 F.2d 408	12, 13
N.L.R.B. v. WILKENING MFG. CO., 207 F.2d 98, 100	13
UNITED STATES RUBBER COMPANY v. N.L.R.B., 373 F.2d 602 (C.A.5)	12
National Labor Relations Board Decisions:	
Metro Truck Body, Inc., 223 NLRB Cases 988	5
Metro Truck Body, Inc., 230 NLRB Cases 28	4

STATUTES	
Federal:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 J.S.C. 151, et seq.)	4
Section 3(b)	5
Section 8(a)(1)	3, 4, 6
Section 8(a)(5)	3, 6
Section 9	4
Section 9(c)	5
Section 9(d)	4
Section 10(b)	10
Federal Rules of Evidence:	
Rule of Evidence 604	2, 3, 10, 11
Rules of the United States Supreme Court:	
Rule 19.1(b)	2

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

METRO TRUCK BODY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

METRO TRUCK BODY, INC., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 10, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed in Appendix A attached hereto, infra.

The judgment of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B, hereto, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth was entered on March 10, 1980. A timely petition for rehearing was denied on February 25, 1980.

The jurisdiction of the Court is invoked under *28 USC ¶1254* and *Rule 19.1(b) of the Rules of the United States Supreme Court;* where a Court of Appeals has, in effect, by ignoring the issue presented on appeal, decided an important question of federal law which has not been, but should be, settled by this court; to wit: what standards should apply to a "true translation" of a NATIONAL LABOR RELATIONS BOARD ballot from English to Spanish and for markings in the Spanish language on the ballots counted and certified for the Union in an NLRB election. This question affects more than the parties to this action since it effects a large population of the United States who are Spanish speaking in administrative and judicial proceedings involving the use and translation of the Spanish language. At issue is the interpretation and application of *Rule 604 of Rules of Evidence for United States Courts and Magistrates,* and *Rule 604 of the Federal Rules of Evidence,* both sections requiring a "true translation."

QUESTIONS PRESENTED

1. Whether the finding of fact by the NLRB[1] that:

On September 1, 1976, a majority of employees in the appropriate unit in a secret ballot election conducted by NLRB designated the Union as their collective bargaining representative,[2] is supported by substantial evidence in the record as a whole where the record does not comply with *Rule 604 of the Federal RULES OF EVIDENCE.*

[1] NATIONAL LABOR RELATIONS BOARD is herein referred to as NLRB.

[2] Transcript of Record, Pleadings, Volume 1, page 116, herein referred to as (R. 116). References preceding a semicolon are to the NLRB findings; those following, to the evidence.

2. Whether the NLRB has conducted a fair hearing re the meaning of the 5th and 14th Amendment of the United States Constitution "due process" clause where the NLRB has denied:

(a) A hearing on the alleged charge herein of Violation of NLRA[3] Section 8(a)(5) and Section 8(a)(1), 29 U.S.C. 158(a)(5) and 29 U.S.C. 158(a)(1), and has granted summary judgment that was opposed by the company,[4] and has entered its orders that are sought to be enforced herein.

STATUTES INVOLVED

Federal Rules of Evidence, Rule 604, provides:

"An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation."

Rules of Evidence—United States Supreme Court Version, *Rule 604* provides:

"An interpreter is subject to the provisions of these rules relating to qualification as an expert and the adminstration of an oath or affirmation that he will make a true translation."

29 USC 160(3)e provides:

"The Board shall have power to petition any court of appeals of the United States, . . ., wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in Section 2112 of title 28, United States Code (28 USC § 2112). . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

[3] NATIONAL LABOR RELATIONS ACT is herein referred to as NLRA.

[4] METRO TRUCK BODY, INC. is herein referred to as the "Company."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

1. Nature of the case

NLRB has filed an application herein pursuant to NLRA, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, et seq.) The basis of the application herein is Section 10(e) of NLRA, 29 U.S.C. 160(e) for the enforcement of its orders issued against the Company on June 14, 1977 and reported at 230 NLRB Cases 28[5] (R. 111-121); infra, Appendix C.

The NLRB orders are in part based on findings of fact and conclusions of law made in a representation proceeding under Section 9 of NLRB, 29 U.S.C. 159, (NLRB Case Number 31-RC-3127), the record of said proceeding being before this Court pursuant to Section 9(d) of NLRA, 29 U.S.C. 159(d).

The United States Court of Appeals for the Ninth District had jurisdiction of this application, because the alleged unfair labor practices are alleged to have occurred at the Company's plant in Torrance, California, within this Court's jurisdiction.

2. Course of Proceedings

(a) *Representation Proceeding*

The Union filed a representation petition on March the 10, 1975 with NLRB (R. 3-4). On March 13, 1975, the Union filed a charge with NLRB alleging that the Company violated Sections 8(a)(3) and (8)(a)(1) of NLRA, 29 U.S.C.

[5] Decisions and Orders of the NLRB, Volume 230, Page 28.

138(a)(3) and 138(a)(1) when it discharged eight (8) employees because they were "illegal aliens." On April 20, 1976, the NLRB dismissed NLRB General Counsel's Complaint, which case is reported, as *Metro Truck Body, Inc.* 223 NLRB Cases 988.

In conformity with NLRB policy to delay representation proceedings until the unfair labor charges are resolved, the representation hearing pursuant to Section 9(c) of NLRA, 29 U.S.C. 159(c) was postponed until after the dismissal of the Section 8 charges; the hearing on the representation proceedings was held on July 28, 1976 (R. 5), before Hearing Officer SHERI ROSS. Decision and Direction of Election was entered on August 5, 1976 by the Regional Director pursuant to authority delegated by NLRB under Section 3(b) of NLRA, 29 U.S.C. 153(b).

The company filed its REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION on August 18, 1976 with NLRB (R. 12), which was denied on August 26, 1976 by NLRB (R. 17).

The representation election was held on September the 1st, 1976 (R. 19-20).

At that time, the Company objected to the Tally of Ballots and indicated that it would file formal Ojections to Tally of Ballots (R. 29).

The Company filed its OBJECTIONS TO TALLY OF BALLOTS AT ELECTION (R. 21) and OBJECTIONS TO ELECTION (R. 29) on September 9, 1976.

The Regional Director purusant to delegated authority (supra) entered his Supplemental Decision and Certification of Representative on September 29, 1976 (R. 47-50).

The Company filed its REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION OF REGIONAL DIRECTOR AND CERTIFICATION OF REPRESENTATIVE on October 8, 1976 with NLRB (R. 51), which was denied by NLRB on November 1, 1976 (R. 60).

(b) *The Unfair Labor Practices Proceeding*

The Union filed a Charge against the Company on January 10, 1977, alleging violations of Sections 8(a)(1) and 8(a)(5) of NLRA in that the Company has failed and refused to bargain in good faith with the Union (R. 61); the Regional Director of NLRB filed his complaint thereon on February 3, 1977 (R. 62-66); the Company filed an Answer to Complaint on February 14, 1977 (R. 67).

General Counsel for NLRB filed a Motion for Summary Judgment on March 2, 1977 (R. 71); the Company filed its OBJECTIONS TO MOTION FOR SUMMARY JUDGMENT on March 31, 1977 (R. 86).

NLRB entered its Decision and Order granting Summary Judgment on June 14, 1977 (R. 111-121), which is the basis for the Application for Enforcement herein.

The Ninth Circuit Court of Appeal entered its Order For Enforcement on March 10, 1980.

3. Statement of Facts Relevant to the Issues

(a) "Majority" of the employees in a unit required for Representation Certification.

The official NLRB ballot that was used at the election had the following instructions:

"MARK AN 'X' IN THE SQUARE OF YOUR CHOICE

MARQUESE CON UNA 'X' DENTRO DEL CUADRO DE SU SELECCION

YES	NO
SI	NO

in response to the question in English and Spanish:

"Do you wish to be represented for purposes of collective bargaining by—

AUTOMOTIVE EMPLOYEES, LAUNDRY DRIVERS & HELPERS LOCAL 88, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA"[6]

(R.18).

The spanish translation for "YES" on the official ballot was "SI" namely one capital "S" and one capital "I". There were no markings placed over the "I" on the official ballot, i.e. no accent mark nor any dot. In Spanish the meaning of the word is changed by the use of a dot or an accent when writing the word (R. 24).

In the instant case, two of the ballots had written in the box under the word "YES" — "SI", the handwritten Spanish word "si" (R. 48). The hand written "si" was dotted; it was not printed in Capital Letters as set forth in the official ballot (R. 18). In Spanish, a handwritten "si" with a dot over the "i" means "if" and not "yes"; "yes" in Spanish has to be written with an accent such as "sí", (R. 24-25).

The two ballots in question were counted as Votes for the Union by BEVERLY JOHNSON, a staff member of NLRB (R. 19-20). Before the election, BEVERLY JOHNSON admitted that she did not understand Spanish (R. 26). During the counting of the ballots the Company objected to BEVERLY JOHNSON counting the two questioned ballots as affirmative ballots cast for the Union, and noted at the bottom of the official Tally of Ballots that formal objections to the Tally would be filed later (R. 19).

---

[6] Herein referred to as the "Union."

The NLRB tally of votes show that:

1.	Approximate number of eligible voters	22	
2.	Void ballots	0	
3.	Votes cast for PETITIONER		13
. . . . .			
6.	Votes cast against participating labor organization(s)		9
7.	Valid votes counted		22

(R. 19).

OBJECTIONS TO TALLY OF BALLOTS AT ELECTION were filed by the Company on September 1976, (R. 21) on the following grounds:

> 1. The mark "si" in Spanish *does not mean* "yes" but rather "if" when it is written with a dot as was written in the two (2) ballots in question. . . . . .
>
> 2. The markings, "si" clearly identify the voters as Spanish Speaking, and therefore destroy the "SECRECY" of the ballot that is mandated by the NATIONAL LABOR RELATIONS ACT. (R. 21-22).

On September 29, 1976 the Regional Director of NLRB made a finding of fact in SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE that "the word "si" printed in the square designated for "yes" votes indicates a clear choice for union representation." (R. 48)

Based on said finding of fact in the representation proceeding, the NLRB concluded in the Unfair Labor Practice case that:

> "4. Since September 29, 1976 the above-named labor organization has been and now is the certified exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act."

and entered its order thereon that is sought to be enforced herein. (R. 119-120)

The Company raised the same issues in REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION OF REGIONAL DIRECTOR AND CERTIFICATION OF REPRESENTATIVE (R. 51 at 53-54); and in ANSWER TO COMPLAINT (R. 67 at 68); and in OBJECTIONS TO MOTION FOR SUMMARY JUDGMENT (R. 86 at 88-90).

(c) *Denials of hearings re;*

(1) Unfair Labor Charges.

On October 8, 1976 the Company filed REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION OF REGIONAL DIRECTOR AND CERTIFICATION OF REPRESENTATIVE on the grounds that:

> (1) That the regional director's decision of a *substantial factual issue* is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (2) That a *substantial question of law or policy* is raised because of, (a) the absence of, or (b) a departure from, officially reported Board precedent. (R. 51)

The text of said request clearly sets forth the *substantial factual issue* of the finding by the Regional Director of a "majority of emplo ees in the unit" as determined by the counting of the two questioned ballots that had "si" written in the "YES" box (R. 53-54).

Said Request for Review on the grounds of *substantial questions of fact and law and policy* was denied by the Board (R. 60).

On January 8, 1977 the Union filed an Unfair Labor Practice charge based on the failure of the Company to bargain (R. 61).

General Counsel for NLRB filed the complaint (R. 62) which the Company answered (R. 67) raising the same issues listed above. MOTION FOR SUMMARY JUDGMENT was granted without hearing (R. 111). The company filed its

OBJECTIONS TO MOTION FOR SUMMARY JUDGMENT setting forth the above issues and the continual refusal of the NLRB to review them. No hearing was ever granted on these issues by the Board.

REASONS FOR GRANTING THIS WRIT

1. *First Question Presented*

The question of what standards for a "True Translation" should apply to translations from the English language to other languages, such as Spanish, and from other languages, such as Spanish, to English in judicial and administrative proceedings have never been decided by this court. This issue is presented clearly and simply in this case and affects more than the parties to this proceeding. Vast portions of the population of the United States of America are now non-English speaking and need accurate translations in judicial and administrative proceedings, if those proceedings are to conform to our standards of Evidence and Due Process.

Section 10(b) of the NLRB amended provides that, so far as practicable, unfair labor practice proceedings shall be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

> *Federal Rule of Evidence Section 604* provides that: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation."

The whole election results are in question because "SI" translated has no meaning without a dot or accent mark.

The only person qualified to translate Spanish in the record of the Representation Proceeding is ANITA L. CASTELLANOS (R. 24). NLRB staff member BEVERLY JOHNSON who tallied the votes disqualified herself as a Spanish Interpreter before the election was held (R. 26).

The only evidence in the record of a "true translation under oath by a qualified interpreter is that of ANITA L. CASTELLANOS. She certified that "si" when written with a dot over the "i" means "if" and *not* "yes".

To interpret "si" otherwise is not a true translation of the Spanish word "si" which is required by ***Federal Rules*** of Evidence Section 604.

The United States Supreme Court has held that the determination of whether a majority of employees in a unit has indicated representation by a Union, be made in accordance with such *formal* (emphasis added) rules or procedure as the Board may find necessary to adopt in the sound exercise of its discretion. ***NLRB v. TOWER CO.***, 329 U.S. 324, 333, 91 L.Ed. 322, 328. To date the Board has not adopted any *formal* rules with regards to "marked ballots" nor has the Board in the present case cited us to any such *formal* rule.

2. *Second Question Presented*

(a) Substantive Due Process

The fifth amendment to the United States Constitution would seem to require that a record of evidence be without ambiguity where translations to and from the English Language are involved. More than just a resemblance to the meaning of the English must be demonstrated. It must convey the true meaning and not a similarity of meaning to be a basis for the determination of rights and duties to follow from the evidence presented to a judicial tribunal or an administrative tribunal. Without this standard of a true translation, the judicial or administrative proceeding becomes a farce.

(b) Procedural Due Process

A fair hearing is required.

"DUE PROCESS" CLAUSE OF THE 14th AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES A FAIR HEARING WHERE THE EMPLOYER CHALLENGES THE RESULTS OF AN ELECTION.

In *NLRB v. ORTRONIX, INC.* 380 F.2d 737 (C.A. 5), the court held that an NLRB hearing is necessary and indispensible if an employer challenges the results of an election since the employer can meet his burden of showing the election was unfairly conducted only through the presentation of evidence in support of his charges.

The court stated:

> "In our view there exist numerous substantial and material issues of fact . . . which call for a formal hearing and the failure of the Board to provide one was a denial of procedural due process."

The court cited its own *UNITED STATES RUBBER COMPANY v. NLRB,* 373 F.2d 602 (C.A. 5) in support of its holding.

In *NLRB* v. *BATA SHOE CO.,* 377 F.2d 821 (C.A. 4), the court held:

> "To borrow the words of Judge Brown, writing for the Fifth Circuit, 'it is clear that Section 8(a)(5) orders which rest on crucial factual determinations, made after ex parte investigations, and without a hearing cannot stand.' *NLRB v. AIR CONTROL PRODS. of ST. PERTERSBURG, INC.,* 335 F.2d 245, 249, (C.A. 5, 1964)."

The court in the *BATA* case supra went on to define what were substantial and material factual issues raised so as to necessitate a hearing:

> "The determination however, of whether substantial and material factual issues have been raised so as to necessitate a hearing is a question of law and ultimately a question for the courts."

citing *UNITED STATES RUBBER CO. v. NLRB,* supra, *NLRB v. SUN DRUG CO.,* 359 F.2d 408, *NLRB v. IDEAL LAUNDRY & DRY CLEANING CO.,* 330 F.2d 712, *NLRB v. JOCLIN MFG. CO.,* 134 F.2d 627, and *NLRB v. POINSETT LUMBER MFG.* 221 F.2d 121.

In discussing the need for a hearing the court stated at page 826 in the *BATA* case, supra:

> "A hearing is unnecessary, therefore, where if all the facts contended for by the objecting party were credited no ground is shown which would warrant setting aside the election. *NLRB v. AIR CONTROL PRODS. OF ST. PETERSBURG, INC.,* supra; accord *NLRB v. SUN DRUG CO.,* supra; *NLRB v. WILKENING MFG. CO.,* 207 F2d 98, 100."

In the instant case, it would appear that if the contention of the Company were all credited on each of the grounds separately stated, there would be grounds for setting aside the election on each of those grounds:

FIRST: If the intent of the two persons who wrote "si" in the box for marking an "X" for the Union Representation, was to write "if" as the literal meaning of the Spanish word "si" means, and not "yes", which is written in Spanish with an accent as "sí", then under Section 9(c) of the National Labor Relations Act the union did not receive more than one vote of the majority of the votes cast as required by the National Labor Relations Act. In this case, the union would receive only 11 votes which would not be enough under the rules and statute requiring one more than majority. In this case there were 22 votes cast, and a majority would be eleven, but the Board Rules require one more, to wit: Twelve (12) votes.

SECOND The whole ballot is in question because 11 of those who were voting marked the ballot in the YES-"SI" Box. The facts show that 15 of the 22 employees voting were Spanish speaking. The ambiguity in the mistranslation of the English word "YES" leaves in doubt the intent or meaning of the employees who are spanish speaking who marked an X in the YES-"SI" box. Did they mean "yes" or did they mean "if"?

CONCLUSION

This court has never interpreted what is meant by a "true translation" by the Federal Rules of Evidence. This case presents clearly and simply the issue that effects a large minority of the population of the United States. Those who do not speak nor understand the English language. It clearly presents to the Court an opportunity to not only clarify the Federal Rules of Evidence as it effects this large minority in daily judicial and administrative proceedings but also give meaning to the due process clause of the Fifth and Fourteenth amendments where translations to and from the English language are involved in the courts and administrative agencies of the United States of America.

Respectfully submitted.

CASTELLANOS & O'NEILL

BY: _____

FRANCIS J. O'NEILL, Esq.

Attorneys for Petitioner
METRO TRUCK BODY, INC.

CASTELLANOS & O'NEILL
Attorneys at Law
1346 Wilshire Boulevard
Los Angeles, California 90017

Telephone: (213) 484-1772

Supreme Court, U. S.
FILED
APR 2 1980
MICHAEL RODAK, JR., CLERK

79-1539

No. .....

In The

Supreme Court of the United States

October Term, 1980

METRO TRUCK BODY, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

CASTELLANOS & O'NEILL
FRANCIS J. O'NEILL, ESQ.

1346 Wilshire Boulevard
Los Angeles, California 90017
Telephone: (213) 484-1772

Attorneys for Petitioner

METRO TRUCK BODY, INC.

PANDICK PRESS WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

TABLE OF CONTENTS

APPENDIX A

Unreported Opinion of United States Court of Appeals for the Ninth Circuit. No. 77-3172. Filed December 28, 1979

APPENDIX B

Judgment of United States Court of Appeals for the Ninth Circuit. No. 77-3172. Filed March 10, 1980.

APPENDIX C

Reported Decision of National Labor Relations Board. 230NLRB No. 28. Case 31-CA-6728. Dated June 14, 1977.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* -vs- METRO-TRUCK BODY, INC., *Respondent.*	No. 77-3172 OPINION

On Application for Enforcement of an Order of the National Labor Relations Board

Before: WALLACE AND ANDERSON, Circuit Judges, and PALMIERI,* District Judge

WALLACE, Circuit Judge:

The National Labor Relations Board (NLRB) found Metro Truck Body, Inc. (Metro) guilty of violating section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, and now seeks to enforce, pursuant to section 10e of the NLRA, 29 U.S.C. § 160(e), the cease and desist order it issued against Metro on June 14, 1977. In response, Metro contends that the election and subsequent certification of the Automobile Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Union) is not supported by substantial evidence in the record as a whole, that the NLRB erred in ordering the election when the Union had not adequately shown that a "substantial number of employees" favored Union representation, and that the

* The Honorable Edmond L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

NLRB's denial of an election objection hearing violated Metro's right to due process of law. We reject Metro's contentions and enforce the order.

In March of 1975, the Union filed a representation petition with the NLRB. The representation hearing was delayed until July 1976 pending resolution of certain unfair labor practice charges filed by the Union. The Regional Director of the NLRB ordered the election to be held September 1, 1976, and on that date 22 ballots were cast, 13 in favor of and 9 in opposition to the Union. One week later Metro filed objections to the election. In response, the Regional Director conducted an administrative investigation which resulted in rejection of the objections and certification of the Union as the exclusive bargaining representative of Metro's employees. Beginning in October 1976, the Union requested Metro to recognize and bargain with it and Metro has continually refused. The NLRB issued a charge in February 1977 alleging violations of section 8(a)(1) and (5) of the NLRA. The company's response admitted its refusal to bargain but claimed, as an affirmative defense, that the certification of the Union was invalid. On June 14, 1977, the NLRB, without hearing, granted a motion for summary judgment against Metro and has now applied to this court for enforcement of the consequent order.

"It is well established that 'Congress has entrusted the [NLRB] with a wide discretion in conducting and supervising elections.'" *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1130 (9th Cir. 1973) (quoting *NLRB v. W. S. Hatch Co.*, 474 F.2d 558, 561 (9th Cir. 1973)); *e.g., NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). Therefore, our review of NLRB supervision of election proceedings and accompanying orders is limited. *NLRB v. Tri-City Linen Supply*, 579 F.2d 51, 55 (9th Cir. 1978); *Coronet-Western v. NLRB*, 518 F.2d 31, 32 (9th Cir. 1975) (per curiam); *NLRB v. Sauk Valley Mfg. Co., supra*, 486 F.2d at 1130. "'If the findings of the [NLRB] are supported by substantial evidence on the record considered as a whole, they are conclusive; and so long as the [NLRB] did not misapply the law, the order is to be affirmed.'" *NLRB v. Pacific Int'l Rice Mills, Inc.*, 594 F.2d 1323, 1325 (9th Cir. 1979) (quoting *NLRB v. Heath Tec. Division/San Francisco*, 566 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 832 (1978)); NLRA § 10(e), 29 U.S.C. § 160(e).

I.

Metro employs both English-speaking and Spanish-speaking personnel. As a result, the ballot for the September 1, 1977 election instructed the employees, in English and Spanish, to mark an X in the box labeled "YES-SI" if they favored Union representation, or in the box labeled "NO-NO" if they did not. On two of the ballots, employees wrote the word "si" in the "YES-SI" box rather than marking the ballot with an X. Because the Spanish word for "yes" is written "sí" with an accent mark over the i, and the Spanish word for "if" is written "si" with a dot over the i, Metro contends that the accentless markings on the two ballots were ambiguous and that the ballots were, therefore, void. "It is well established, however, that in representative elections, the [NLRB] will count all ballots where the voter's intent has been *clearly manifested*, even if the voter has not followed the proper designation procedure, provided that the mode of designation does not reveal the voter's identity." *NLRB v. Sauk Valley Mfg. Co., supra*, 486 F.2d at 1133 (emphasis added). *E.g., NLRB v. Tobacco Processors, Inc.*, 456 F.2d 248 (4th Cir. 1972) (per curiam); *NLRB v. Titche-Goettinger Co.*, 433 F.2d 1045, 1048 (5th Cir. 1970); *NLRB v. Whitinsville Spinning Ring Co.*, 199 F.2d 585, 588 (1st Cir. 1952). Therefore, "the fundamental question in counting any ballot is for whom or for what did the voter who cast the ballot intend to be counted. . . ." *Id.* at 587.

In this case, we have no doubt that the persons who marked the two ballots in question intended to vote in favor of the Union. The fact that "si" was placed in the "YES-SI" box

rather than the "NO-NO" box indicates an affirmative response to the question that was asked both in English and in Spanish. In addition, the response was consistent with the ballot itself because the word "SI," as it appeared above the "YES-SI" box, was also not punctuated with an accent mark. We agree with the conclusion of the Regional Director that the word "si," if interpreted as "if," as Metro contends, would be a meaningless *non sequitur* in the text of the ballot. Support of unionization was "clearly manifested" by the challenged ballots and the NLRB properly counted them as votes in favor of Union representation.

Metro also contends that the two ballots should be voided because they reveal the identity of the voter. This argument would have merit if only two of Metro's 22 voting employees spoke Spanish. It clearly has no merit, however, in the facts of this case: 15 of Metro's 22 employees were Spanish-speaking.

II.

Section 9(c)(1)(A) of the NLRA, 29 U.S.C. § 159(c)(1)(A), states that the NLRB shall investigate a petition and may order an election, "[w]henever a petition shall have been filed . . . alleging that a *substantial number of employees* (i) wish to be represented for collective bargaining" by the union. (Emphasis added.) As a rule of thumb, the NLRB normally investigates only those petitions which indicate that the union is supported by at least 30 percent of a company's employees. In this case, the initial petition revealed authorization card support in excess of that requirement. However, because eight of the employees who signed authorization cards were subsequently discharged by Metro as illegal aliens in the United States, Metro claims that the Union did not have the requisite 30 percent support among employees at the time of the NLRB representation investigation. Thus, according to Metro, the NLRB lacked jurisdiction to investigate the petition and order an election.

We disagree. The section 9(c)(1)(A) substantial interest requirement is not a jurisdictional prerequisite to NLRB action as Metro contends. Rather, it is an "administrative expedient[] only, adopted to enable the [NLRB] to determine for itself whether or not further proceedings are warranted, and to avoid needless dissipation of the Government's time, effort and funds" through investigation of frivolous petitions. *In re O. P. Jennings & Co.*, 68 N.L.R.B. 516, 517-18 (1946), *quoted in NLRB v. J. I. Case Co.*, 201 F.2d 597, 599 n.3 (9th Cir. 1953). Were the NLRB unable to require a substantial interest on the part of the target company's employees before commencing an investigation, it would be forced to investigate every representation petition filed by a union, regardless of the actual chances of that petition's success. To avoid such waste, Congress created the substantial interest requirement, thereby preserving the NLRB policy of investigating only those petitions that the NLRB determined to be of substance.[1]

---

[1] As originally enacted, the NLRA contained no substantial interest requirement. Section 9(c) stated:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

National Labor Relations Act, Pub. L. No. 74-198, § 9(c), 49 Stat. 449 (1935).

In the years following enactment of this language, however, the NLRB adopted a policy of investigating only those representation petitions that were supported by a showing of substantial interest among employees of the target company. *NLRB v. J. I. Case Co.*, 201 F.2d 597, 598 (9th Cir. 1953). When the current section 9(c)(1)(A) language was adopted, requiring allegations that "a substantial number of employees . . . wish to be represented" by the union, Congress made it clear that it did not intend to affect those NLRB "rules of decisions with respect to dismissal of petitions by reason of inadequate showing of representation. . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 431 (1948).

When this screening purpose of the section 9(c)(1)(A) substantial interest requirement is understood, it logically follows that there is no purpose in permitting the parties to litigate the adequacy of a union showing of substantial interest. That requirement exists simply to aid the NLRB in focusing only upon meaningful representation petitions. If the ensuing investigation reveals a "reasonsable cause to believe that a question of representation affecting commerce exists," the NLRB is required to hold a hearing in which, "[i]f the [NLRB] finds . . . [that] a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c)(1). The question of union support is conclusively decided by the representation hearing and the actual secret ballot election. There is no need to litigate its existence at the initial petition stage.[2] Those circuits which have considered this issue agree. *E.g., Intertype Co. v. NLRB,* 401 F.2d 41, 43 (4th Cir. 1968), *cert. denied,* 393 U.S. 1049 (1969); *NLRB v. Louisville Chair Co.,* 385 F.2d 922, 926-27 (6th Cir. 1967), *cert. denied,* 390 U.S. 1013 (1968); *NLRB v. National Truck Rental Co.,* 239 F.2d 422, 424-25 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 1016 (1957); *Kearney & Trecker Corp. v. NLRB,* 209 F.2d 782, 787-88 (7th Cir. 1953); *NLRB v. White Constr. & Engineering Co.,* 204 F.2d 950, 953 (5th Cir. 1953). *See also Goodyear Tire & Rubber Co.,* 138 N.L.R.B. 453 (1962).

[2] Metro incorrectly contends that this nonlitigability rule is based upon a single interest: the desire to maintain the confidentiality of those employees who have expressly favored unionization in advance of an actual election. Because the identity of all Metro employees who signed authorization cards was previously revealed at an NLRB unfair labor practice hearing, Metro contends that, absent the sole confidentiality interest protected by the nonlitigability rule, it should be permitted to litigate the adequacy of the Union showing of substantial interest. However, as stated above, the nonlitigability rule derives from the nature of the substantial interest rule as an administrative expedient, not solely from a desire to protect the confidentiality of preelection union supporters.

III.

Throughout the lengthy history of this case, Metro was never given a full evidentiary hearing about its objections to the election; that the two improperly marked ballots should have been voided, that the Union's initial showing of substantial interest was inadequate, and that the Union created a racially inflammatory environment in which a fair election was impossible. Metro claims that the denial of such a hearing violated its right to due process of law.

"It is well established that a hearing is not required in every case to determine the validity of objections to a Board-conducted election. . . ." *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 33 (5th Cir. 1969), *quoted in NLRB v. Sauk Valley Mfg. Co., supra,* 486 F.2d at 1133.

> As we have consistently explained, in order to obtain a hearing on an election objection, "the objecting party must supply prima facie evidence, 'presenting substantial and material factual issues' which would warrant setting aside the election." . . . Thus, if the objector fails to proffer specific evidence which would constitute a prima facie showing of its contentions, or if those contentions, even if true, would not warrant setting aside the election, then the Board need not grant an administrative hearing.

Natter Manufacturing Corp. v. NLRB, 580 F.2d 948, 951 (9th Cir. 1978), *cert. denied,* 439 U.S. 1128 (1979), *quoting NLRB v. D. McFarland Co.,* 572 F.2d 256, 261 (9th Cir.), *cert. denied,* 439 U.S. 911 (1978) (citations omitted).

Our examination of Metro's three objections to the election causes us to conclude that Metro's right to due process was not violated by denial of a hearing. Metro's contention that the two improperly marked ballots should have been voided would have had, as we have seen, no impact upon the outcome of the election because the ballots, though improperly marked, clearly manifested a desire for Union representation. Nor would

Metro's substantial interest contention have altered the election's validity; it would not have been litigable even if a hearing had been permitted. Metro's final objection to the election, that Union actions created a racially inflammatory atmosphere preclusive of a fair election, was supported by no evidence produced by Metro. "[T]he party challenging the election carries a heavy burden in charging that coercion prevented a fair election, for evidence must be furnished overcoming the presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees." *Valley Rock Products, Inc. v. NLRB,* 590 F.2d 300, 302 (9th Cir. 1979). In failing to produce any evidence at all in support of its racial inflammation contention, Metro fails to "supply *prima facie* evidence presenting substantial and material factual issues which would warrant setting aside the election." *Id.* Metro was not entitled to a hearing on the racial inflammation issue or on any other of its election objections. Metro was not denied due process of law.

ORDER ENFORCED.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
METRO TRUCK BODY, INC.,
Respondent.

No. 77-3172

JUDGMENT

Before: Wallace and Anderson, Circuit Judges, and Palmieri,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of an Order issued by it against Respondent, its officers, agents, successors and assigns on June 14, 1977. The Court heard argument of respective counsel on November 6, 1979, and has considered the briefs and transcript of record filed in this cause. On December 28, 1979, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Metro Truck Body, Inc., Torrance, California, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Automotive Employees, Laundry Driv-

* The Honorable Edmond L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

ers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, shipping and receiving employees, warehousemen, truckdrivers, body repairmen, printers, mechanics, truck body builders, and leadmen; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its office and place of business in Torrance, California, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 31, (Los Angeles, California) after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where the notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

Costs in this court in favor of the petitioner and against the respondent.

28 copies of the petitioner's opening brief...	$47.03
28 copies of the petitioner's reply.....	31.64
Records Reproduction.....	15.00
	$93.68

SO ORDERED:

JUDGES:

/s/ RICHARD H. DEANE
Richard H. Deane, *Clerk*

J. CLIFFORD WALLACE
J. Clifford Wallace, CJ

ATTEST:

/A TRUE COPY

Richard H. Deane, *Clerk*

J. BLAINE ANDERSON
J. Blaine Anderson, CJ

EDMUND L. PALMIERI
Edmund L. Palmieri, DJ

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATE COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargin collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of American, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, shipping and receiving employees, warehousemen, truckdrivers, body repairmen, printers, mechanics, truck body builders, and leadmen; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

METRO TRUCK BODY, INC.

APPENDIX C

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

Metro Truck Body, Inc. *and* Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.
Case 31-CA-6728

June 14, 1977

BY MEMBERS PENELLO, MURPHY, AND WALTHER

Upon a charge filed on January 10, 1977, by Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on Metro Truck Body, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint and notice of hearing on February 3, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 29, 1976, following a Board election in Case 31-RC-3127, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and

[1] Official notice is taken of the record in the representation proceeding, Case 31-RC-3127, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

that, commencing on or about October 4, 1976, and, more particularly, on or about January 14, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 14, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 2, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 18, 1977, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, entitled "Objections to Motion for Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent admits its refusal to bargain but denies the validity of the Board's certification of the Union on the ground that the Union's representation case petition was not supported by an adequate showing of interest and that it is entitled to a hearing on the substantial and material issue raised by its objections to the election which were erroneously overruled without a hearing.

Our review of the record herein, including that in Case 31-RC-3127, discloses that Respondent, at the hearing and by letter, moved to dismiss the petition therein because of the alleged insufficiency of the showing of interest as it included

authorization cards of illegal aliens who could not vote. In his Decision and Direction of Election issued August 5, 1976, the Regional Director denied the motion on the grounds that showing of interest was not litigable at the hearing and that he was satisfied that the Union's showing of interest conformed to Board requirements. Respondent filed a timely request for review, reiterating its showing-of-interest contention. On August 30, 1976, the Board denied the request as raising no substantial issue warranting review.

In an election conducted on September 1, 1976, the Union was successful by a vote of 13 to 9 with no ballots challenged. Respondent filed timely objections to the election and to the tally of ballots, with supporting affidavits, in which it alleged, in substance, that: (1) two ballots marked "si" should not have been counted since "si" in Spanish does not mean "yes" (sí), but, rather, means "if" and, since the use of "si" identified the voters as Spanish speaking, the secrecy of the ballots was destroyed; (2) the Union failed to show a substantial interest among the employees petitioned for as required by the Act; and (3) the election was influenced by racial prejudice resulting from a strike called by the Union to force Respondent to violate Federal and state law regarding the employment of illegal aliens. After an investigation, but without a hearing, the Regional Director, on September 29, 1976, issued a Supplemental Decision and Certification of Representative in which he overruled Respondent's objections in their entirety because they failed to raise material or substantial issues which would warrant setting aside the election. Acccordingly, he certified the Union.

Respondent filed a timely request for review of the Regional Director's decision, with supporting exhibits, in which it substantially reiterated the contentions urged in its objections to the election and tally of ballots. In a telegraphic communication of November 1, 1976, the Board denied Respondent's request for review as raising no substantial issues warranting review. By its denial of review, the Board agreed with the

Regional Director's overruling Respondent's objections without a hearing. To be entitled to a hearing, a respondent must raise material or substantial issues which would warrant setting aside the election.[2] As Respondent here has not satisfied this qualification for a hearing on its election objections, it has not been denied due process by the Board's overruling its objections without a hearing.[3]

It thus appears that Respondent is endeavoring here to litigate matters heard and determined in the underlying representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

---

[2] *N.L.R.B. v. Modine Manufacturing Co.*, 500 F.2d 914, 916 (C.A. 8, 1974), enfg. 203 NLRB 527 (1973).

[3] *Allied Meat Company*, 220 NLRB 27 (1975); *CSC Oil Company*, 220 NLRB 19 (1975).

[4] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is a California corporation with its principal office and place of business in Torrance, California, where it is engaged in the manufacture of truck bodies. Respondent annually sells goods or services valued in excess of $50,000 to customers or business enterprises within the State of California, which themselves meet one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standard.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, shipping and receiving employees, warehousemen, truckdrivers, body repairmen, printers, mechanics, truck body builders, and leadmen; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On September 1, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 29, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 29, 1976, and, more particularly, on or about October 4, 1976, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 4, 1976, and, more particularly, on or about January 14, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 4, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the

initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Metro Truck Body, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, shipping and receiving employees, warehousemen, truckdrivers, body repairmen, printers, mechanics, truck body builders, and leadmen; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 29, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 4, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Metro Truck Body, Inc., Torrance, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, shipping and receiving employees, warehousemen, truckdrivers, body repairmen, printers, mechanics, truck body builders, and leadmen; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

Post at its office and place of business in Torrance, California, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, shipping and receiving employees, warehousemen, truckdrivers, body repairmen, printers, mechanics, truck body builders, and leadmen; excluding all all other employees, officer clerical employees, professional employees, guards and supervisors as defined in the Act.

METRO TRUCK BODY, INC.

Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1539

In the Supreme Court of the United States

OCTOBER TERM, 1979

METRO TRUCK BODY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 25070

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1539

METRO TRUCK BODY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1—A-8) is reported at 613 F.2d 746. The decision and order of the National Labor Relations Board (Pet. App. C-1—C-11) is reported at 230 N.L.R.B. 212. The Regional Director's denial of election objections and certification of representation (Bd. Case No. 31-RC-3127) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B-1—B-3) was entered on December 28, 1979, and a petition for rehearing was denied on February 25, 1980. The petition for a writ of certiorari was filed on April 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board abused its discretion over representation matters in concluding, without holding an evidentiary hearing, that two ballots marked in Spanish were not ambiguous.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.* are:

> Section 8(a), 29 U.S.C. 158(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 9(a), 29 U.S.C. 159(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

> ployees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

The Union [1] won a representation election among a unit of petitioner's ("the Company") employees by a vote of 13 to 9 (Pet. App. C-3). The Company filed objections to the conduct of the election, alleging, *inter alia*, that two ballots were void and should not have been counted because they were marked ambiguously and permitted identification of the voters (R. 21-23, 29-30).[2] The facts concerning this allegation follow:

Approximately 15 of the eligible voters spoke Spanish (R. 48). Therefore the ballots used in the election instructed the employees in both Spanish and English to mark an X in the box labeled "YES-SI" if they favored Union representation or in the box labeled "NO-NO" if they did not (R. 18, 48). Two voters wrote the word "si" in the YES-SI boxes of their ballots instead of marking them with an "X" (R. 21-22, 48). The Company argued that the two ballots—

---

[1] Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

[2] "R." references are to the record designated "Volume I Pleadings" used in the court below. A copy has been lodged with the Clerk of this Court.

which were counted as votes for the Union—were ambiguous because the Spanish word "si," which was written in the "yes" box, did not have an accent over the letter "i" and therefore meant "if," not "yes" (*ibid.*). Therefore the Union received only 11 affirmative votes, which, the Company asserted, was less than a majority (R. 22).

The Regional Director rejected the Company's contentions (R. 48-49), and the Board denied review of his decision (R. 60). The Regional Director explained (R. 48-49):

> Inasmuch as construing the marking "si" as "if" would result in a *non sequitur* in the context of the ballot and as the Board has held that writing the word "yes" or "no" on a ballot is a clear indication of the intent of the voter, I conclude that the word "si" printed in the square designated for "yes" votes indicates a clear choice for union representation. Further, as there was no evidence presented to establish that the ballot was deliberately marked for the purpose of identification and as two-thirds of the eligible voters are Spanish speaking, I conclude that the secrecy of the two ballots in question has not been impaired.

The Union was certified as the bargaining representative, the Company refused to bargain, and the Board, on summary judgment, found the Company's refusal to bargain violative of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). The Board ordered the Company to bargain with the Union (Pet. App. C-1—C-4, C-7).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-8). The court stated that there was "no doubt that the persons who marked the two ballots in question intended to vote in favor of the Union" (Pet. App. A-3).

ARGUMENT

The Company does not challenge the Board's settled policy, upheld by the courts, of counting "all ballots where the voter's intent has been clearly manifested, even if the voter has not followed the proper designation procedure * * *" (*NLRB* v. *Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1133 (9th Cir. 1973)), so long as the unconventionally marked ballots "do not inherently disclose the identity of the voter * * *." *Knapp-Sherrill Co.*, 171 N.L.R.B. 1547, 1548 (1968). Rather the only issue here is whether the Board erred in concluding that the markings on the two ballots were not ambiguous and that ballot secrecy was not breached.[3] That factual issue does

---

[3] Contrary to the Company's contention (Pet. 10-11), Fed. R. Evid. 604 relating to the use of translators has nothing to do with the issue here. In the first place, the Company never invoked that Rule before the Board or objected that its requirements were not met. Judicial review of that claim therefore is foreclosed under Section 10(e) of the Act, 29 U.S.C. 160(e). *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). In any event, the issue here is not whether correct Spanish grammar dictates that an accent mark be used when the term "si" is intended to mean yes. The issue is whether, despite that requirement, the markings on the ballots involved here were unambiguous in the particular context of this Board election.

not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In any event, for the reasons set forth in the Regional Director's supplemental decision (R. 48-49) and the court's opinion (Pet. App. A-3—A-4), the Board's conclusion was plainly correct.

Similarly, the Company does not dispute the well settled proposition that it is entitled to a hearing on its objections only where substantial and material factual issues exist (Pet. 12-13, citing cases). Rather, the Company merely contends that it has met that test here. This, too, is a factual issue which does not warrant review by this Court.

In any event, the Company's contention (Pet. 13) that the ballots of all employees who voted yes are in question because of the "ambiguity of the mistranslation of the English word 'Yes' " was not raised before the Board (R. 21-22, 53-54), and hence may not be raised here (see note 3, *supra*). Its contention (Pet. 13) concerning the proper tally of ballots were its objections found meritorious has nothing to do with whether it is entitled to a hearing to resolve those objections. Moreover, that contention is erroneous.[4]

[4] The Board requires that, in order to win an election, a union must receive "[a] majority of the valid votes cast * * *." NLRB Case Handling Manual, Part 2, Section 11340.4; *Semi-Steel Casting Co.* v. *NLRB*, 160 F.2d 388, 391 (8th Cir.), cert. denied, 332 U.S. 758 (1947); *NLRB* v. *Vulcan Furniture Mfg. Corp.*, 214 F.2d 369, 372 (5th Cir.), cert. denied, 348 U.S. 873 (1954). Thus, even if, contrary to the findings of the Board and the court below, the two questioned ballots are invalid, as the Company contends, the Union, with 11 votes, received a majority of the 20 valid ballots cast. It was not necessary, as the Company assumes, for the Union to have received 12 votes, a majority of the total number of ballots cast (22).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

MAY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 320292 313